

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Lori A. Dowling,

Complainant,

ORDER OF DISMISSAL

v.

Jeff Davies,

Respondent.

On November 23, 2010, Lori Dowling filed a Campaign Complaint with the Office of Administrative Hearings alleging that Grand Rapids Public Works Director Jeff Davies violated Minnesota Statutes §§ 211B.06 and 211B.09. The Complaint alleges that Mr. Davies engaged in activities designed to defeat her campaign for re-election to Itasca County Commissioner, District 1.

After reviewing the Complaint and attachments, the Administrative Law Judge concludes that the Complaint does not state *prima facie* violations of Minnesota Statutes §§ 211B.06 or 211B.09.

Based upon the Complaint and the supporting filings and for the reasons set out in the attached Memorandum,

IT IS ORDERED:

The Complaint of Lori Dowling is DISMISSED.

Dated: November 30, 2010

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

The Complainant, Lori Dowling, was the incumbent candidate for Itasca County Commissioner, District 1 in the November 2010 election. She lost her bid for re-election to her opponent, Davin Tinquist.¹ Mr. Tinquist is the Chief of the Cohasset Fire Department.

The Complaint alleges that Jeff Davies, the Public Works Director for the City of Grand Rapids, used his official position and city resources to “interfere” with the Complainant’s campaign for re-election. According to the Complaint, Mr. Davies publicly supported Mr. Tinquist’s candidacy and used his relationship with Minnesota Department of Transportation (MNDOT) staff to target Ms. Dowling’s campaign signs for removal from highway right of ways.

The Complaint also alleges that Mr. Davies assisted in preparing a Letter to the Editor of the *Grand Rapids Herald Review* newspaper that was published on October 23, 2010, under the signature of Lonny Witkofsky. According to the Complaint, Mr. Davies used his influence as Director of Public Works to cause Mr. Witkofsky to sign the letter. The letter set forth Mr. Witkofsky’s reasons for not supporting Ms. Dowling’s candidacy, including what Mr. Witkofsky described as her incivility and mudslinging during the campaign, and her inability to work on the Commission as a team player. The Complaint contends that the letter was slanderous and extremely damaging to Ms. Dowling’s campaign.

The Complaint alleges that by these actions, Mr. Davies violated Minnesota Statutes 211B.09 and 211B.06 of the Fair Campaign Practices Act.

Improper Influence Claims

Minn. Stat. § 211B.09 provides:

An employee or official of the state or of a political subdivision may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. A political subdivision may not impose or enforce additional limitations on the political activities of its employees.

The Complaint alleges no facts to support finding that Mr. Davies used forceful or overwhelming pressure to compel MNDOT staff to remove Ms. Dowling’s campaign signs from highway right-of-ways. The Complainant attached copies of certain electronic mail messages to her Complaint. In these messages, Mr. Davies inquires of MNDOT staff as to whether certain campaign signs are located within the highway right-of-way.

¹ See, Election Returns, Minnesota Secretary of State’s website.

State law prohibits the placement of campaign signs, as well as other forms of advertising, within the limits of any highway in Minnesota.² This is significant for two reasons: First, removing signs that are unlawfully posted within a highway right of way is not “political activity” within the meaning of Minn. Stat. § 211B.09. Second, the messages sent by Davies are insufficient to support finding that he abused his official authority or influence to exert pressure on MNDOT staff, as alleged in the complaint.³

Likewise, the Ms. Dowling alleges no facts to support her claim that Mr. Davies used his authority to compel Mr. Witkofsky to sign the letter to the editor that was published on October 23, 2010. With only the bare allegation, she has not pled enough facts to raise a fact question or to require Mr. Davies to meet this claim at a hearing.⁴

Because the Complaint fails to state a *prima facie* violation of Minn. Stat. § 211B.09, these allegations are dismissed.⁵

False Literature Claim

Minn. Stat. § 211B.06 provides in relevant part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot

² Minn. Stat. § 160.27 (2008).

³ Minn. Stat. § 211B.34, subd. 2 (2008).

⁴ In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975). Compare also, *State v. Florence*, 239 N.W.2d 892, 903 (Minn. 1976).

⁵ Compare, *Burns v. Valen*, 400 N.W. 2d 123, 127 (Minn. Ct. App. 1987) (the display of campaign literature by government employees at the county courthouse did not “compel” fellow employees to participate in campaign activities); *Wigley v. Orono Public Schools*, OAH Docket No. 3-6326-19653-CV (2008) (Complainants failed to allege sufficient facts that would support finding a *prima facie* violation of Minn. Stat. § 211B.09 where they “alleged no facts to support finding that the Respondents used forceful or overwhelming pressure to compel anyone to create and disseminate campaign material or to take part in some other political activity”) (<http://www.oah.state.mn.us/aljBase/632619653.primafacie.htm>); *Lillyquist v. Bernhjeltn*, OAH Docket No. 7-6310-16288-CV (2004) (public school Superintendent's handing campaign material to a teacher, during a cordial conversation, did not violate the restrictions in Minn. Stat. § 211B.09) (<http://www.oah.state.mn.us/aljBase/631016288.fdg.htm>); *Tast v. Phillips*, OAH Docket No. 21-6379-16251-CV (2004) (a teacher's refusal to remove a campaign button did not compel students to participate in political activity) (<http://www.oah.state.mn.us/aljBase/637916251.pf.dismissal.htm>) with *Halvorson v. Nelson*, OAH Docket No. 4-6301-16282-CV (2004) (a complaint that alleged that the Mayor threatened reprisals against a city employee who hosted the lawn sign of a competing candidate did state a violation of Minn. Stat. § 211B.09) (<http://www.oah.state.mn.us/aljBase/630116282.primafacie.htm>).

question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

Under this statute, campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”⁶

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of specific facts.⁷ The statute does not bar criticism that is merely unfair or unjust,⁸ nor is the statute intended to prevent unfavorable deductions or inferences from a candidate’s conduct; even if those conclusions might be misleading or incomplete.⁹ Likewise, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.¹⁰

The letter to the editor reflects Mr. Witkofsky’s opinion of Ms. Dowling and sets forth his general criticism of her conduct during the campaign. The Complaint alleges that the letter was slanderous and damaging to Ms. Dowling’s candidacy as well as to her future employment opportunities. Because the Complaint does not identify which specific statements in the letter are factually false and does not allege that the Respondent knew the statements were false or disseminated them with reckless disregard as to whether they were false, the Complaint fails to allege a *prima facie* violation of Minn. Stat. § 211B.06.

Lastly, the Administrative Law Judge notes that the Complaint also alleged that some unidentified members of the Cohasset Fire Department defamed Ms. Dowling by stating that she was seen running naked from the burning home of a mayoral candidate in August 2009. Because Ms. Dowling failed to identify the fire department members, these allegations are not sufficiently detailed to sustain a Fair Campaign Practices Act Complaint. Moreover, because these statements, if they occurred, were not disseminated by way of campaign material or a letter to the editor, they appear to be outside the jurisdiction of the Administrative Law Judge. The prohibition against false

⁶ Minn. Stat. § 211B.01, subd. 2 (2008).

⁷ See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

⁸ *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which “told only one side of the story,” or were merely “unfair” or “unjust,” without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

⁹ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

¹⁰ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974)). See also, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); ; *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).

campaign material in Minn. Stat. § 211B.06 is limited to certain written material and excludes oral statements.¹¹

The Complaint is dismissed in its entirety.

E .L. L.

¹¹ See, *Stegner v. Smith*, 2008 WL 2967011 at *4 (Minn. App.) (concluding that oral statements do not constitute “campaign material” within the meaning of § 211B.01); *Stegner v. Smith, et al*, OAH Docket No. 11-6381-19135-CV (2007); *Koalska v. Juneau*, OAH Docket No. 7-6312-16225-CV (2004).